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SUMMARY RECORD OF THE 536th MEETING

Held at Headquarters, New York,
on Friday, 10 June 1994, at 10 a.m.

Chairman: Mr. MORAN (Spain)

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The meeting was called to order at 10.15 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/XXVII/CRP.2 and Add.1-3)

1. The CHAIRMAN invited the members of the Commission to continue with the adoption of the report of the drafting group and to inform him whether they agreed to the proposal to replace the expression "minimum level" in articles 41 sexies bis and 41 sexies quater (A/CN.9/XXVII/CRP.2/Add.2) with the word "threshold".

2. Mr. JAMES (United Kingdom) said that his delegation was ready to accept that proposal and, with the exception of that modification, was in favour of retaining articles 41 sexies bis, 41 sexies ter and 41 sexies quater as contained in document A/CN.9/XXVII/CRP.2/Add.2.

3. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt document A/CN.9/XXVII/CRP.2/Add.2, the only modification being the replacement of the words "minimum level" by "threshold".

4. Mr. HERRMANN (Secretary of the Commission) suggested replacing the title of chapter III bis as contained in document A/CN.9/XXVII/CRP.2/Add.1 ("Special method for procurement of services") with "Principal method for procurement of services". That change would make it clearer that what was meant by "procedures for alternative methods of procurement" (chap. IV) was methods other than the principal method, i.e., in the procurement of goods and construction, alternatives to tendering (chap. III) and, in the procurement of services, alternatives to the method referred to in chapter III bis.

5. Mr. JAMES (United Kingdom), Mr. LEVY (Canada), Mr. CHATURVEDI (India), Mr. GRIFFITH (Observer for Australia), Mr. GOH (Singapore) and Mr. SHI Zhaoyu (China) supported the Secretary's proposal.

6. The CHAIRMAN invited the Commission to turn to document A/CN.9/XXVII/CRP.2/Add.3, which contained a footnote concerning article 16, on methods of procurement, and chapter V, which dealt with review.

7. Mr. LEVY (Canada) said that his delegation fully endorsed the document. He wished to know whether, in the version of the Model Law that would appear in the Commission's report, articles would be renumbered in order to avoid the use of bis, ter, quater, quinquies and so forth.

8. Mr. HERRMANN (Secretary of the Commission) said that that would be the case. He also wished to inform delegations that the final version which would appear in the Commission's report would be an edited version for all six languages. In the future, then, they should therefore refer to that version and not to the texts that would be distributed to them at the end of the session.

9. Mr. CHATURVEDI (India) noted that his delegation had expressed reservations on a number of clauses during the debate on chapter V. He hoped that they would

be reflected in the report. Since the Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services was not ready for publication, he wished to know whether a footnote referring to that fact could be inserted.

10. Mr. GRIFFITH (Observer for Australia) asked whether, in the final version, chapter III bis would be retained, so that the numbering of the other chapters would correspond to the chapters of the Model Law on Procurement of Goods and Construction, or whether the chapters would be renumbered beginning with chapter III. He would favour the second option.

11. The CHAIRMAN replied that it would be preferable to renumber the chapters. If there were no other remarks, he would take it that the Commission wished to adopt document A/CN.9/XXVII/CRP.2/Add.3.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter III, section B (continued)

12. Mr. HOLTZMANN (United States of America), referring to section B of the annotated check-list (A/CN.9/396/Add.1, chap. III), said that, while it was important that any objections as to the jurisdiction or composition of the arbitral tribunal should be raised as soon as possible, before the proceedings had gone too far, it would not be advisable to raise those two matters at a preparatory conference for several reasons, of which the most important was incompatibility with the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration.

13. With regard to objections to the composition of the arbitral tribunal, both the Regulations and the Model Law specified that any party that wished to challenge an arbitrator must do so within 15 days after becoming aware of any grounds for challenge. If the party had been aware of the grounds prior to the preparatory conference, it could not then wait until the conference to act unless that took place within the 15 days, which would be purely coincidental. On the other hand, a party which at the preparatory conference waived its right to make a challenge and which subsequently discovered grounds for challenge should not be deprived of its right to take advantage of the 15-day period provided for in the Arbitration Rules and the Model Law, or of any other period of time provided for under other rules or national law.

14. With regard to objections as to the jurisdiction of the arbitral tribunal, under the UNCITRAL Arbitration Rules the delivery to the respondent of a simple notice of arbitration sufficed for the arbitral proceedings to be deemed to have commenced, and the statement of claim could be delivered to the respondent within a period of time - several weeks or even several months - determined by the arbitral tribunal, which also determines the period of time within which the respondent must deliver his statement of defence. In practice, however, those time periods were often determined in consultation with the parties during the preparatory conference. It would therefore be entirely inappropriate to ask whether a party had an objection as to the jurisdiction of the arbitral tribunal even before that party was in possession of the statement of claim itself and

the complete file. Moreover, under the Arbitration Rules and the Model Law, a plea that the arbitral tribunal did not have jurisdiction must be raised not later than in the statement of defence. To ask the parties at the preparatory conference whether they had any objection as to jurisdiction would thus be tantamount not only to asking them to take a decision before they had all the necessary information, but also to shortening the time-limits for arbitration established by UNCITRAL itself.

15. Mr. BONELL (Italy) said that he fully endorsed the remarks by the representative of the United States of America. Like the representative of Thailand, he believed that the question of the tribunal's jurisdiction should not be taken up in the context under discussion, and he recalled that article 16, paragraph 2, of the Model Law provided that "a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings". The matter therefore could be raised either early in the proceedings or later on, depending on the particulars of the case. The role that preparatory conferences could play must not be overestimated. They were definitely not the appropriate forum for a discussion of the applicable law or of the value of arbitration ex aequo et bono.

16. Mr. ABASCAL ZAMORA (Mexico) said that he agreed with the arguments advanced by the representative of Italy; the check-list should cover situations in which a party challenged the jurisdiction of an arbitrator and requested that he should decline to hear the case. A party might introduce such a challenge when preparing its defence, which was why the question should be included in the check-list of topics for discussion. The decision to do so should be left to the parties and not to the members of the arbitral tribunal, even in consultation with the parties, in order to prevent a counter-claim.

17. Mr. CHATURVEDI (India) agreed that the question of jurisdiction should not be included in the check-list. The parties, and not the arbitrators, should raise the question, and they could do so at any point in the proceedings.

18. Mr. TUVAYANOND (Thailand) said that under articles 12 and 13 of the Model Law, the parties were free to challenge the composition of the arbitral tribunal at any time, and not only during a period of 15 days. The 15-day period began only once the grounds for challenge were known. Once the parties were aware of those reasons, whether at the time of the tribunal's constitution of the tribunal or in the course of the arbitral proceedings, they were free to raise objections. There was no reason to deny them the opportunity to do so during a preparatory conference. Although the Guidelines stipulated that any problems arising in that regard should be addressed early in the proceedings, the question of the tribunal's "mandate" required clarification. A preparatory conference provided an opportunity to raise objections to an interpretation that supposedly ran counter to the arbitrators' mandate as understood by the parties. The concept of jurisdiction was only vaguely dealt with in the Guidelines. The jurisdiction of the arbitral tribunal should be clearly spelt out in the arbitration agreement. The matter should not be dealt with in the part of the text under discussion.

19. Mr. HERRMANN (Secretary of the Commission) said that the distinction drawn by the representative of Thailand between "mandate" and "jurisdiction" was more a matter of terminology than of substance. Under the UNCITRAL Model Law and Arbitration Rules, the jurisdiction of the arbitrators to settle the dispute derived directly from the arbitration agreement. The arbitration agreement must apply to the dispute before the tribunal and that explained how the "mandate", which was covered by the notion of "competence", came into play. The objective of section B, in his view, was simply to determine whether the arbitrators were in fact arbitrators and not merely three persons who were not involved in the dispute, i.e. whether the arbitrators had been selected by the parties to settle the dispute. A second aspect of the notion of "mandate" had been alluded to by the representative of Italy when he had quoted article 16, paragraph 2, of the Model Law. If at a later stage in the proceedings a party believed that a matter raised during the discussion fell outside the scope of the arbitration agreement and that the tribunal therefore lacked jurisdiction, or was not mandated, to rule on the matter, it would be perfectly normal for that party to challenge the jurisdiction of the arbitrators. In general, however, such situations arose only very late in proceedings and there was therefore no need to deal with them at preparatory conferences. A number of speakers, including the representative of Thailand, had stated that the parties should not be prevented from taking up certain topics during preparatory conferences. However, those were topics which the arbitral tribunal might automatically raise, and it was inconceivable that the tribunal would challenge its own jurisdiction. Accordingly, he believed that, while it was not necessary to include the topic in the agenda, that did not prevent the parties from raising it. To prohibit a topic from being raised on the grounds that it was not on the agenda seemed an excessively formal approach.

20. The notion of an objection to the composition of the arbitral tribunal had nothing to do with the concept of challenge proceedings. Section B was concerned with the method of appointing the arbitrator and definitely not with the arbitrator's impartiality or jurisdiction. The objective was to determine whether the arbitrator had in fact been designated by the competent authority and whether all the formal requirements had been met. The intent definitely was not to take up matters dealt with in articles 12 to 14 of the Model Law.

21. Mr. TUVAYANOND (Thailand) said that the mandate - or jurisdiction - of the arbitral tribunal normally was set out in the arbitration agreement. It was difficult to understand why a party would oppose a provision it had itself accepted. It would, of course, be useful to raise any issue that might arise with respect to the jurisdiction or mandate of the arbitral tribunal, but only for purposes of clarification and not by way of objection. To authorize one party to raise an issue that was not included in the agenda was unfair to the party that, caught unawares, would be obliged to improvise while the other would have had time to prepare its case. In the case of the appointment of the arbitrators, while an objection could be raised if irregularities had occurred, it was also possible to challenge the arbitrators themselves at any time after their appointment, provided that no more than 15 days had passed since the grounds for the objection had become known.

22. Mr. CHOUKRI SBAI (Morocco) said that arbitration rules customarily dealt with the concept of mandate or jurisdiction and with the means for determining

the composition of the arbitral tribunal. The arbitration agreement defined that mandate. Section B should be drafted in more neutral language, indicating, for example, that a party might have good reasons to raise the issue of the tribunal's composition if it had doubts or objections in that regard. It was important to avoid making a value judgement by stating that an objection was likely to cause delays or cast doubt on the tribunal's jurisdiction.

23. Mr. HERRMANN (Secretary of the Commission) said that delegations appeared to be labouring under a misapprehension which was the result of poor drafting. The first sentence under "Remarks" in section B ("... may not always be desirable") applied to the arbitral tribunal. It definitely did not apply to the behaviour of either party, about whom no value judgement was made. The section was simply intended to draw attention to the advantages or disadvantages of a particular method, as had been done throughout the Guidelines.

24. Mr. GOH (Singapore) agreed with the representative of the United States of America: the question of objections should not be included in the annotated check-list. Arbitration began when the parties designated the arbitrators. By the time a preparatory conference was convened the proceedings had already been under way for some time, and any objection as to the jurisdiction of an arbitrator should already have been raised.

25. Mr. GRIFFITH (Observer for Australia) said that he, too, believed it would be best to delete section B or to use much less precise language - indicating, for example, that the tribunal should inquire whether both parties accepted its composition. Arbitration Rules included procedures for challenging the Tribunal's composition and the parties should not be encouraged to raise objections in that regard.

26. Mr. JONKMAN (Observer for the Permanent Court of Arbitration) said that the framework of the discussion should be clarified. If the Commission was dealing with guidelines whose purpose was to offer suggestions to the parties so that they could plan the arbitration as efficiently as possible, then it really would be best not to include the matter in the agenda or deal with it at all in the document. However, if what was intended was a simple memorandum, a list of questions that might eventually arise, then it might be useful to retain that matter.

27. Mr. HERRMANN (Secretary of the Commission) said that it was his understanding that the purpose of the check-list was not to present a neutral list of all situations that might arise but rather to indicate the advantages and disadvantages of a given course of action and the risks it might entail. In that sense, the annotations it contained were guidelines.

28. Mr. HOLTZMANN (United States of America) said that the distinction between "mandate" and "jurisdiction" was artificial. In one possible scenario, for example, if the arbitration clause stipulated that an arbitral tribunal must settle the dispute on the basis of the domestic law of a particular country, any attempt to invoke the law of another country would be considered to be outside its "mandate". However, it might just as easily be asserted that it was outside the tribunal's jurisdiction to rule on the basis of the law of another country.

29. The notion of objections to the composition of the arbitral tribunal had not been intended to cover the notion of challenge. The problem could be resolved by not using the word "composition" or by clarifying its meaning. Clearly, if an arbitral tribunal was improperly constituted, i.e. if the persons serving as arbitrators had not been so designated in the arbitration agreement, then the question of the tribunal's jurisdiction arose. However, objections as to jurisdiction would be more appropriately considered under section D of the check-list, on defining issues and order of deciding them, rather than under section B. Lastly, the fact that a matter was not raised at the exact moment envisaged in the Guidelines should not prevent it from being raised at some other time pursuant to the arbitration rules or the applicable law. The point was to protect the parties from their own mistakes and to prevent disputes as to the jurisdiction or composition of the tribunal from arising at a later stage.

30. Mr. HERRMANN (Secretary of the Commission) said that his point had not been whether the fact that a party had not raised an objection at a preparatory conference would prevent him from doing so at a later stage, but simply whether a party would be prevented at a preparatory conference from raising a matter which was not on the agenda of the conference.

The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.

31. Mr. DUCHEK (Austria) said that it would be best to delete section B. As to whether the question of the applicable substantive law could be considered at the preparatory conference, he noted that the parties might raise the issue at that stage, when defining the points at issue (section D (i) of the check-list) or agreeing on undisputed facts or issues (section E), since in some situations facts might be relevant under the legislation of one country but not under the legislation of another. The question of the applicable law might arise when procedures were planned, and it might be helpful if the parties agreed on that point during the preparatory conference. The Guidelines should provide for that situation.

32. Mr. CHATURVEDI (India) said that it was the Commission's duty to draw up guidelines and not merely an indicative list; it should therefore proceed cautiously when considering a given section or deciding to retain it. With regard to section B of the check-list, the parties were free to decide whether they wished to take up the matter of the jurisdiction and composition of the arbitral tribunal, and they could do so at any time. However, it was in their interest to do so as early as possible in order to save time and money. On the other hand, it was not the task of the arbitrators to determine whether or not the question of the Tribunal's jurisdiction and composition should be raised. To prevent them from taking that initiative, it would be preferable to delete section B or amend it.

33. Mr. TUVAYANOND (Thailand) said that section B served a useful purpose and that the solution might be to rephrase it using the words "accept" or "approve". The arbitral tribunal must be able to seek clarifications concerning its mandate. With regard to the applicable substantive law, for example, even where the parties had selected a particular national law and there was thus no question of any objection to the applicable law, the arbitrators still might need to clarify for themselves whether they were dealing with the law in its

current form or as it had stood on a particular date. His delegation would agree to the deletion of section B provided that the questions of jurisdiction and the applicable law were covered under section D. The tribunal must be able to seek clarifications at the preparatory conference in order to avoid stalling tactics later on, which were costly for everyone.

34. Mr. SEKOLEC (International Trade Law Branch) said that the practitioners consulted by the secretariat believed that the question of the applicable substantive law could be dealt with under section D (i), but only for the purpose of deciding whether it should be considered at a later stage. Defining the applicable law and ascertaining whether there was agreement on the law to be applied were two different things. Furthermore, the issue was one on which the parties might wish to provide written submissions, a situation which could not be anticipated at a preparatory conference, which was concerned with procedure.

35. Mr. SHI Zhaoyu (China) said that section B should be retained and, if necessary, amended to reflect the views of delegations. The annotated check-list of possible topics for preparatory conferences should be as long as possible. The arbitral tribunal should also, where appropriate, be able to hear very early in the proceedings any objections by the parties as to its jurisdiction and composition. The parties, for their part, should be able to raise the question when they deemed it appropriate to do so.

36. Mr. OLIVENCIA (Spain) said that, however important it might be, the question of the arbitral tribunal's jurisdiction and composition should not be included in the agenda of a preparatory conference. Once an agenda had been drawn up listing the topics for discussion, there was no reason to address questions that were not on that agenda, and the tribunal itself should not propose an agenda that included the question as to whether the parties challenged its jurisdiction or composition.

37. A preparatory conference convened at the outset of the proceedings might be the appropriate time to determine whether the parties objected to the tribunal's jurisdiction or composition, but that initiative should be left to the parties. In so far as those were the issues that had to be settled first, the question of possible objections to them should be raised on a preliminary basis at a preparatory conference convened very early in the proceedings and, if there were no objections, that fact should be noted; the question should not, however, be specifically included in the agenda of the preparatory conference. Accordingly, his delegation proposed that section B should be amended to avoid giving the impression that the matter was an agenda item introduced by the arbitral tribunal.

38. His delegation viewed the Guidelines under discussion as a guide, along the lines of the UNCITRAL Legal Guide, the purpose of which was to provide and analyse information, describe the matter under consideration, record possible problems, weigh the pros and cons of different approaches, propose various options and, finally, recommend prudent courses of action. The Guidelines should be viewed as a tool for arbitrators, albeit one that was not binding and did not prejudge any given issue.

39. As to their scope, the Guidelines were clearly not intended to be used solely in the context of the UNCITRAL Arbitration Rules, international arbitration or the rules of arbitral institutions; they should be general in nature, although that did not preclude the possibility that, where the UNCITRAL Arbitration Rules were applied, the proceedings in question would be governed by specific provisions of those Rules.

40. His delegation therefore proposed that a working group should be established after the conference of the International Council for Commercial Arbitration to allow more time for a more thorough exchange of views on the draft guidelines.

41. Mr. BONELL (Italy) asked the Chairman to summarize the discussion as it had evolved.

42. The CHAIRMAN said that since the discussion was intended to be an exchange of views on the document prepared by the secretariat for the purpose of eliciting the opinions of delegations so that a more complete document could be submitted to the working group whose establishment had been proposed, the secretariat would be in a better position to summarize the discussion or, if necessary, to highlight those issues on which clarifications should be sought from delegations.

Chapter III, section C

43. Mr. LEVY (Canada) agreed that it would be useful to establish a working group, but wondered whether the fact that the Commission would have considered the document at its twenty-seventh session and stated its position on the matter might not hamper the working group's efforts.

44. His delegation had certain reservations regarding section C, for it encouraged an inexperienced arbitrator to assume the role of mediator, thereby running the risk of leading the parties into an unforeseen process or outcome. An arbitrator should not get involved in settlement matters. Accordingly, the section should state that the arbitrator should be kept informed of all the settlement proceedings but should not participate in them. It was inappropriate to raise the issue of settlement during the preparatory conference. However, since the continental European States took a different approach to the issue than did the United States of America, the United Kingdom, Canada and the Commonwealth countries, for example, short of simply deleting all the provisions in square brackets, the best solution would be, at the very least, to issue a stern warning against the dangers of that practice.

45. Mr. ABASCAL ZAMORA (Mexico) said that he agreed with the representative of Canada, pointing out that an arbitrator's role was different from that of a mediator. An arbitrator had the task of determining the truth, the content of the agreement between the parties and their behaviour and then of handing down the decision by which they must abide. The role of a mediator, on the other hand, was to try to understand the positions of the two parties and to get them to agree to a solution to their dispute. When an arbitrator became a mediator, he risked losing his impartiality and acquiring prejudices during the conciliation process, thereby compromising any future settlement.

46. Clearly, the best way for an arbitrator to encourage conciliation was to do his job as an arbitrator in such a way that the parties, recognizing that he was acting reasonably in his search for a solution, would be motivated to do likewise. In any event, while it must be acknowledged that the practice whereby arbitrators assumed the role of conciliators existed in many countries, it was necessary to warn of the dangers inherent in that practice.

The meeting rose at 1 p.m.